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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Docket No. ~~1,070~~ 114

GENERAL ELECTRIC COMPANY,

Petitioner,

against

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF GRANTING THE WRIT.

DAVID L. BENETAR,
Counsel for Petitioner,
420 Lexington Avenue,
New York 17, N. Y.

THOMAS F. HILBERT, JR.,
H. H. NORDLINGER,
ROBERT C. ISAACS,
NORDLINGER, RIEGELMAN, BENETAR & CHARNEY,
Of Counsel.

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The questions here presented both in the petition for a writ (pp. 2-3) and in Respondent's brief (p. 2) are substantial and important. Respondent's brief (p. 2) has undertaken to restate the questions presented. While the substance of their statement of the questions is not greatly different than ours, we prefer to rest upon our own statement.

Respondent's initial argument against granting the writ that it would extend "the accumulated delays" (brief, p. 10) has a hollow ring, especially in view of the fact that the Union delayed for periods of over two years in seeking to have a court direct arbitration of certain of these grievances (R. pp. 58a, 61a, 67a, 68a) in spite of the fact

that such action is mandated by the contract of the parties where there is a dispute over arbitrability.

The most important question in this case is how far the federal law will go to imply an agreement to arbitrate where the parties have hedged their contract with provisions designed to restrict the areas of arbitrability.

The parties herein are in fundamental disagreement as to the function of the court in cases arising under Section 301(a) of the Labor Management Relations Act, 1947. Respondent, brushing aside the terms on which the parties agreed to arbitrate, regards a court's function as merely rubber stamping a case "To arbitration" once it is determined that there is *any* agreement to arbitrate and that the Union claimed that the Company had violated one or more provisions of the agreement.

It seems worth while to point out that nowhere in the National Labor Relations Act is there a declaration of national policy in favor of arbitration. On the contrary, in Section 203(d), Congress provided as follows:

> "(d) Final adjustment by a *method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (Italics ours)

Of course it is still the law, as has been reiterated by *all* the cases on the subject up to the present day, that parties are not bound to arbitrate except as they have agreed to do so, and that it is for the court to determine whether the particular dispute sought to be arbitrated is one which the parties have agreed to arbitrate, and whether the reluctant party has breached its agreement to do so.

This does not mean that the court's sole function is the routine one of passing the decision on to the arbitrator. The court has a judicial function; and it must be exercised judicially.

True, the courts have set their faces against attempts, in the guise of raising questions regarding the jurisdiction of the arbitrator, to persuade the court to decide the merits of the controversy. But this does not mean that where, as in the case at bar, the question has been squarely presented whether the controversy is one which has been expressly excluded from the competency of the arbitrator, the court is impotent to rule on that question.

The Petitioner contends that the expressed intention of the parties as to what and under what conditions they will arbitrate is controlling and that it is the court's duty to analyze the contract to determine whether the parties agreed to arbitrate a given dispute. Expressed in the words of *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 at page 241, "... whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered by the parties."

In Answer to Respondent's Arguments.

A. The question whether Petitioner has breached its agreement to arbitrate includes and is dependent upon the question whether Respondent has or has not complied with conditions precedent to its right to compel arbitration. Accordingly, in our view it must be determined by the Court. The grant of certiorari in *Livingston* v. *John Wiley & Sons, Inc.* (No. 934 October Term, 1962) to review this question reinforces the view that the writ should be granted here.

Respondent's brief (pp. 10-12) acknowledges the existing split in the Circuits, the conflict in district court decisions and the grant of certiorari in the *Wiley* case (313 F. 2d 52).

Fundamentally it is still the court's function to determine whether the parties have agreed to submit a matter to an arbitrator and whether the reluctant party has breached its agreement to do so. The *Steelworkers* cases do not purport to change that principle. If the parties have required compliance with conditions precedent before a matter can reach the arbitration forum, the agreement to arbitrate cannot be held to have been breached without a finding that the agreed conditions precedent to arbitration have been complied with. Since whether an agreement to arbitrate has been made and has been breached is for the court, it would follow that compliance with conditions precedent to arbitrate is not to be decided in the arbitration forum.

Since this question is presently before this Court in *Wiley*, this Court should have the benefit of Petitioner's views on this matter.

B. The construction of Article XV 3(b) of the Agreement providing that no arbitrator shall have authority to decide certain matters, fixes the boundaries of the arbitration promise. The fact that this question has come up before this Court three times and that certiorari was denied on this question in the recent *Carey* v. *Westinghouse* case (11 N. Y. 2d 452, No. 485, October Term, 1962) indicates that the question is one of importance. The denial of certiorari in *Westinghouse* left in effect a final decision directly contrary to the Court of Appeals holding herein.

Respondent acknowledges (App. 13-14) that this very issue has been before this Court on two prior separate occasions [*Carey* v. *Westinghouse* (cited in the heading) and *Radio Corporation of America* v. *Associated Professional Engineering Personnel*, 291 F. 2d 105 (Cir. 3), cert. den. 368 U. S. 898]. The fact that this is the third appear-

ance of this issue before this Court emphasizes the importance of the problem that requires this Court's solution. The disparity of treatment of this provision by the federal and state courts in New York, we submit, makes it imperative that this problem be resolved rather than have parties relegated to shopping for forums.

C. The contention that arbitration of certain grievances was preempted by the jurisdiction of the National Labor Relations Board raises no new issue of importance is disproved by *Local 1050, Int'l Bhd. of Elec. Workers* v. *Local 1836, Int'l Assn of Machinists*, 304 F. 2d 365 (Cir. 1) and the grant of certiorari in *Carey* v. *Westinghouse*, 11 N. Y. 2d 452 (No. 485).

The very fact that the issue is presently before this Court (pp. 14-16) in *Carey* v. *Westinghouse* would indicate that Petitioner herein should be permitted to present its arguments and this Court should have the benefit of such arguments.

Respondent's request for discriminatory treatment between Petitioner and a different company reviewing a like question before this Court is completely devoid of reason. It arbitrarily seeks Petitioner's preclusion from the benefit of the review by this Court of the issue.

D. The Respondent's contention that "No important question of federal law is raised by Petitioner's other objections to arbitration" is without foundation.

1. The Respondent's position (pp. 16-17) that no important question of federal law is raised where it seeks to compel arbitration for an unlawful result carries the theory that "the role of the court is minimal" (Respondent's brief, p. 17) to a *reductio ad absurdum*. To support this position Respondent has inaccurately quoted and misapplied a sen-

tence in *Bethlehem Steel Co.* v. *SLRB*, 330 U. S. 767 (1947) at 775. That case involved entry by the State Labor Board into a case within the exclusive jurisdiction of the National Board. This Court held that the State Board had no jurisdiction. In answer to the supposition that the State Board might reach the same result as the National Board, this Court said, "But the power to decide a matter can hardly be made dependent on the way it is decided." This is not authority for Respondent's position—it is, in fact, authority directly to the contrary; for it is a holding that where the only decision within its jurisdiction that a tribunal can make is a decision *one way* then it has no jurisdiction to make any decision at all. Moreover, Article XV 2(b) of the instant agreement provides that if either party advises the American Arbitration Association (the body designated to implement arbitration under the agreement) that no arbitrable issue is raised, the Association cannot proceed to process the arbitration until a court has finally determined that there are arbitrable issues "and has directed arbitration of such issues". This provision makes evident that such questions are to be determined before, *not after*, arbitration has been had. If arbitration cannot result in an effectual award, then, it is evident that under the parties' agreement arbitration must be denied.

2. The provision of the contract that New York law is applicable has meaning and importance. Under the present law of New York the arbitration agreement is subject to the same rules of construction as any other contract. There is no presumption of arbitrability. This limited proposition was not passed on by *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). None of the cases cited bear on this proposition. Certainly the parties

could have provided that there shall be "no presumption of arbitrability". The provision that New York law governs stands for this very point. It is the present difference between the federal and state law.

Conclusion.

The Petitioner respectfully reiterates that the petition for a writ of certiorari should be granted.

Dated: June 10, 1963.

Respectfully submitted,

David L. Benetar,
Counsel for Petitioner,
420 Lexington Avenue,
New York 17, N. Y.

Thomas F. Hilbert, Jr.,
H. H. Nordlinger,
Robert C. Isaacs,
Nordlinger, Riegelman, Benetar
& Charney,
Of Counsel.